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JUDGE MAYER SULZBERGER

In these days, when we have an indefinite number of tribunals from which issue forth constant streams of decided cases,[1] it would seem to be needless and unprofitable to make a study of the decisions handed down by any one judge, particularly if he be a member of a court of inferior or limited jurisdiction. Occasionally, however, a new star swims slowly into the firmament. A judge appears—sometimes in the most humble of tribunals—not content to follow with scrupulous deference the prior adjudications of other courts; a judge who has the scholarship and cultural background that bid him hold fast to what is true and good, and has as well the courage and the intellectual equipment to liberate himself from outworn formulæ and the imagination and creative ability to advance original theories. The decisions of such a judge are worthy of examination and review, not merely as judicial precedents, but as contributions to the science of jurisprudence.

An outstanding figure in the legal profession in America[2] said of Mayer Sulzberger that "he would have adorned any Bench to which he might have been called," and his contemporaries at

[1] It is estimated that there are about 15,000 volumes of English and American law reports, with an annual increase of about 250 volumes.

[2] Louis Marshall, *Memorial Address,* delivered May 30, 1923, published in AMERICAN JEWISH YEAR BOOK, Vol. 26, at p. 373.

the bar and on the bench heartily concurred in this judgment.[3] His acknowledged preëminence as a jurist is attested by the fact that to him the learned Chief Justice of Pennsylvania dedicated his scholarly treatise on "Trial by Jury." [4]

Among lawyers and judges, whose principal interest lies in the law and its cognate studies, his high rank should be secure, but it is doubtful whether the importance of his judicial utterances has been generally realized. The reputation acquired for him by his amazing scholarship as an Orientalist and Hebraist,[5] so unusual in its profundity, may have tended to obscure the depth of his legal learning; and so outstanding was his leadership in civic and communal affairs [6] that the important part he played in the administration of law and equity may have been overshadowed by those sides of the man's nature which came more often to the public eye. Thus, the incidental and avocational in his career may have been overemphasized, and his more important life-work unwittingly minimized.

Moreover, the fact that he was, throughout his judicial career,[7] judge of a court where cases are initiated, tended to detract somewhat from his fame as a jurist. It is mistakenly thought by many that only appellate judges can appreciably influence the development of the law.

Those who are best qualified to judge of Mayer Sulzberger's

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[3] See Addresses of Norris S. Barratt, Hampton L. Carson, and Frank P. Prichard, delivered on January 8, 1920, upon the occasion of the presentation of portraits of Judge Sulzberger to the Court of Common Pleas No. 2 and to the Law Association of Philadelphia.

[4] "This book is dedicated to my friend, Mayer Sulzberger, for years President Judge of the Court of Common Pleas No. 2 of Philadelphia County, whose deep and varied learning in diverse fields, and ready scholarship in the law, early won my admiration." See also p. 195, where the Chief Justice describes Mayer Sulzberger as a "master judge."

[5] He was the author of THE AM HA'ARETZ, in which for the first time the existence of a parliamentary organization in the ancient Jewish Commonwealth was presented; THE POLITY OF THE ANCIENT HEBREWS, THE LAW OF HOMICIDE, and THE STATUS OF LABOR AMONG THE ANCIENT HEBREWS.

[6] He was founder and chairman of the American Jewish Committee, trustee of the Baron de Hirsch Fund, vice-president of the Jewish Hospital Association, founder and president of the Young Men's Hebrew Association, trustee of the Jefferson Medical College, member of the Board of City Trusts, to mention only a few of his many communal interests.

[7] Judge of the Court of Common Pleas No. 2 of Philadelphia County from 1895 to 1902, and President Judge from 1902 to 1916.

manifold and varied accomplishments agree that great as he was as scholar and public leader, he was greater still as jurist, and that like his celebrated co-religionist, Sir George Jessel, Master of the Rolls of England, it was his distinction that, although sitting in a court of first instance, he was what is termed, with varying degrees of praise and censure, a "lawmaking judge," [8] whose decisions, by reason of their inherent judicial equity rather than their conformity with precedent, soon became guiding *dicta.*

Throughout twenty-one years on the bench of the Court of Common Pleas No. 2 of Philadelphia County, Mayer Sulzberger wrote many opinions, any one of which is certain to prove helpful to the student or practitioner of the law. Many of these decisions are, by their very nature, technical in character, and most of them are such as would permit of no other conclusions than he was compelled to arrive at by reason of their very facts. There is, however, a range of cases wherein a judge has an opportunity for choice between alternatives that are frequently nicely balanced. By the decision that he makes in such cases, and by the reasoning which sways the balance in favor of either side, the philosophy of the deciding judge, his outlook upon men and things, becomes manifest.

In this study, so far as possible, the Judge has been allowed to speak for himself. Quotations and extracts from his adjudications are set forth as fully as may be required for the proper exposition of his opinions and of the method by which he arrived at his judicial conclusions. There have been selected for review only those opinions of Judge Sulzberger that may prove of interest both to the layman and to the lawyer, those which indicate his erudition, the soundness and clarity of his argumentation, the nicety of his diction, and more particularly his characteristic social, economic and political points of view.

Most of the cases demonstrate especially Judge Sulzberger's attitude toward the doctrine of *stare decisis,* that doctrine of the

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[8] As to the nature of Judge-Made Law, see 1 BL. COMM. *69, and Willis v. Baddeley, [1892] 2 Q. B. 324, at 326. See also Hale, *Preface to Rolle's Abridgment*; 5 BENTHAM, COLLECTED WORKS 477; AUSTIN, JURISPRUDENCE, Lect. xxxviii, xxxix; SIR F. POLLOCK, ESSAYS 239-273.

common law which, speaking generally, gives binding authority to judicial precedents but whose boundaries are so vague and shadowy as to be incapable of definition.

Justice Black of the Supreme Court of Pennsylvania declared,[9] "If each new set of judges shall consider themselves at liberty to overthrow the doctrines of their predecessors, our system of jurisprudence (if system it can be called) would be the most fickle, uncertain and vicious that the world ever saw. . . . To avoid this great calamity, I know of no resource but that of *stare decisis.*" [10] The same judge, when Chief Justice, in the course of another opinion [11] emasculated the doctrine by declaring, "I am not saying that we must consecrate the blunders of those who went before us. A palpable mistake must be corrected. . . . There are old decisions of which the authority is become obsolete by a total alteration in the circumstances of the country and the progress of opinion. *Tempora mutantur.*" [12]

When Judge Sulzberger detected an error in a precedent he ignored it. He had no patience with the middle age casuistry which presupposes an immutable common law, incapable of adapting itself to the changing needs of society. He differed radically from Blackstone, according to whom a precedent is to be followed because "what was before uncertain and perhaps indifferent, is become absolute rule, which it is not in the breast of any subsequent judge to alter or vary from, he being . . . not delegated to pronounce new law, but to maintain the old one." [13] He refused to believe that a decision is not to be changed by the judges because it is law, and that it is law because it is not to be

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[9] Hole v. Rittenhouse, 2 Phila. 411 (1856).

[10] "It is an established rule to abide by former precedents," says Blackstone, 1 COMM. *69. "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community has a right to regard it as a just declaration of the law, and regulate their actions by it," says Chancellor Kent, 1 COMM. *475-476.

[11] McDowell v. Oyer, 21 Pa. 417, at 423 (1853).

[12] Similarly Blackstone and Kent qualified the doctrine when they stated, respectively: "Yet this rule admits of exception, where the former determination is most evidently contrary to reason." (1 COMM. *69); and "The judges are bound to follow that decision unless it can be shown that the law was misunderstood or misapplied in that particular case." (1 COMM. *476.)

[13] 1 COMM. *69.

changed by the judges.[14] He knew to the contrary that frequently judges actually do change or create law, and not merely declare and apply it.

Judge Sulzberger knew, too, how largely the English law is the creation of judges, "for they not only make the precedents, but say when the precedents shall be followed or departed from." Like that other distinguished American judge, Benjamin N. Cardozo, he regarded judicial precedents as "more or less tentative hypotheses," to be followed only where they are socially serviceable and to be ignored or set aside where they lead to conclusions at war with new social needs.[15]

He realized that good judges are not immune to the influence of the dominant public opinion of their generation. As Dicey pointed out,[16] "Eldon and Kenyon belonged to the era of old Toryism as distinctly as Denman, Campbell, Erle and Bramwell belonged to the age of Benthamite liberalism." Judge Sulzberger, in his judicial utterances, reflected prevalent public opinion and he was at the same time guided by the fundamental rules of the common law, which, in the language of Mr. Justice Mitchell, "adapts the application of fixed principles to changes in the affairs of men."

Cases on Social Problems

Included in the twilight zone of the law, where different judges arrive at varying decisions, depending upon the peculiar temperament, background and outlook of each of them, there is a great variety of cases involving social questions. Judge Sulzberger had occasion to decide many such problems. He consistently approached their consideration with the view that society is organized for the protection and advancement of human interests, and that legal rights and obligations are created by

[14] This is described as a "favorite fiction" in Dillon, Laws and Jurisprudence of England and America (1895) 267; and a "childish fiction" in Holland, Jurisprudence (12th ed., 1917) 66.

[15] See Cardozo's brilliant volumes entitled The Nature of the Judicial Process (1921) and The Growth of the Law (1924), published by the Yale University Press.

[16] Law and Opinion in England, Lecture xi: *Judicial Legislation.*

humankind for the purpose of assisting it to approach perfection. Thus, he unhesitatingly discarded legal principles which he believed to be socially injurious.

(a) *The Individual and Society*

The problem of the relation between the interests of the individual and the welfare of society is one that has long been debated by jurists. Some philosophers consider that the primary object of organized society in creating legal rights should be the protection of the freedom of the will of the individual. Judge Sulzberger never concurred in this Hegelian theory. To him, society's interests were paramount to the individual's wants. Whenever he scented a conflict between the will of the individual and the general welfare of the community, he compelled the former to subordinate itself to the latter.

For example, the law has guarded most zealously the right of the individual to the benefit of the performance of contracts made with his fellow-men. The interests of society are sought to be safeguarded by the general legal principle that contracts in their essence opposed to public policy are void and should not be enforced by the courts. Obviously, there are cases in which there is a conflict between the will and interest of the individual and the need and welfare of society, and wherein it is not easy for any court, however wise, to say whether the contract is or is not "against public policy."

A concrete illustration is the well-established rule that an agreement entered into for a valuable consideration not to set up a competitive business within definite limits of time or space is enforceable in equity and that its breach will be prevented by a court. In 1908 there came before Judge Sulzberger a case[17] which most judges would quickly have disposed of as one to which the foregoing principle was unquestionably applicable, but the Judge set aside this rule as subordinate to another doctrine which he held to be even mightier in its force—that the community has a right to be protected against the danger of being deprived of its needs.

[17] Thomas v. Borden, 17 Pa. D. R. 620 (1908).

In this case Judge Sulzberger, while sitting as a chancellor in equity, was asked by one dentist to enjoin another from engaging in the practice of extracting teeth in the City of Philadelphia with the assistance of nitrous-oxide gas. The bill of complaint averred that in 1903 a written agreement had been entered into between the orator and the respondent, both practicing dentists, which provided that the latter was to have active charge of the practice and to receive a share of the receipts. The agreement was to continue for five years, and the respondent undertook not to engage in the practice of extracting teeth with the use of nitrous-oxide gas in the City of Philadelphia during the continuance of the agreement, or within five years after its termination. Before the date of the expiration of the agreement, the respondent discontinued practicing with the orator, and made preparations to engage in the business of extracting teeth on his own account. The orator sought to restrain the respondent by an injunction, the petition for which came up for hearing before Judge Sulzberger.

The jurist was inclined to refuse the prayer of the complainant, because he realized that to issue an injunction would be tantamount to conferring upon the plaintiff a quasi-monopoly of an important field of dentistry. He found himself, however, confronted by a line of decisions in which equity had caused injunctions to issue in similar cases involving merchants and tradesmen, and by two cases in Pennsylvania in which physicians had been enjoined from practicing their profession in violation of agreements not to do so.

In his opinion the Judge declared that when a man is tired of his business and sells it, agreeing not to compete with the buyer within a certain limit of time or space, equity will protect the buyer by enjoining the seller. He held that "the substitution of an active man, bent on success in the future, for one who feels himself ready to rest, is a stimulus to more active trade, and hence a real gain to the public." Judge Sulzberger thus explained away the two decisions which restrained physicians from violating their covenants, for in both cases the physicians happened to have sold their practices and good-will to the complainants. He pointed

out that the case before him was essentially different in character. The complainant, instead of being "an active man bent on success in the future," was a man of very mature age, and of limited activity, with a proneness to take long rests at places distant from the city, and such a man was seeking to maintain a monopoly of a field of dentistry not by his own efforts, but mainly by the efforts of persons in his employ, whose full efforts he thus controlled.

Thus having differentiated the two precedents dealing with medical practitioners, Judge Sulzberger proceeded to the heart of the problem. He distinguished between trade and the learned professions, pointing out that theoretically, at least, the latter are not practiced for gain in the same sense as trade is carried on for profit merely; that the former is conducted for the most part by means of clerks, salesmen and other assistants who are hardly to be deemed professional, *i. e.,* particularly trained for the practice of their vocations by long courses of study, while the practice of a profession is purely personal; and, moreover, that capital plays an important part in the former, while in the latter the requisites are capacity, character and service.

The Judge also declared that it has always been a cardinal principle of the ethics of science, and especially of medicine, that any scientific discovery that tends to save life or health, or to promote the general welfare of mankind, must be published and taught, and that to hoard it for the purpose of gain is selfish and unprofessional.

He concluded his opinion as follows:

> "It was testified to, that besides the plaintiff, there was nobody but the defendant and one or perhaps two others who were expert in this particular branch of dentistry. The operation is one requiring skill and expertness, and is not without some degree of peril to life or health. The plaintiff's health seems precarious and uncertain, his absences from the city are long and oft-repeated, and the public have no reasonable assurance that they can command his services when necessary. Shall he be allowed by a mere trading contract to deprive the suffering citizens of Philadelphia of the benefits of scientific aid? He has his contract. The defendant has broken it. His

remedy at law is unquestioned. That this remedy is inconvenient and probably inadequate, is his objection. A chancellor, however, is bound to measure the inconvenience to the community. We think that in this aspect the plaintiff's case fails. He has no equitable right to a trading monopoly or quasi-monopoly in the scientific means of relieving human suffering, and the community has a right to be protected against the danger of being deprived of medical relief at the will of the plaintiff."

From this decision an appeal was taken to the Supreme Court of Pennsylvania, counsel for the appellant being two of the then greatest lawyers of Philadelphia. The Supreme Court dismissed the appeal, but studiously refrained from lending approval to the reasoning of the chancellor, basing its dismissal on purely technical grounds.[18]

There can be little question that agreements by physicians, surgeons or dentists to be limited in any degree in their professional practice, will be enforced by equity and that they are not to be regarded as in conflict with any sound principle of public policy.[19] Judge Sulzberger's decision in this case was perhaps subconsciously influenced by the tradition of the Jewish law in which medicine has always been held in particularly high esteem and the physician has been looked upon as a being superior in intellect to the ordinary member of the community.[20] Whether this be so or not, there can be no doubt that a study of the opinion in this case shows that Judge Sulzberger was more concerned with satisfying social needs than with following legal precedents, and that the communal welfare was to him the paramount desideratum.

The conflict between the freedom of will of the individual

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[18] *222* Pa. 184, 70 Atl. 1051 (1908).

[19] See 32 C. J. 221, § 342. The nearest approach to Thomas v. Borden, *supra*, note 17, is the case of Rakestraw v. Lanier, 104 Ga. 188, 30 S. E. 735 (1898), where it was held that some time limit is essential in a contract by a physician to desist from the practice of his profession, but no time limit is required in a contract by a merchant or tradesman not to engage in his business.

[20] Moral Precept: "Honor a physician with the honor due unto him for the uses which you may have of him," Eccles. (Sirach) 38, 1-2. Legal Ordinance: Every city is required to have at least one physician, and to live in a city that has none is recklessly hazardous. Sanhedrin, 17 b.

and the interests of society is, of course, most frequent and pronounced in the domain of criminal law. This branch of jurisprudence is, however, largely the product of statutory enactment, and judges, even law-making judges, have scant opportunity to "make" criminal law.[21] Judge Sulzberger, nevertheless, in at least one important case decided in the criminal court, demonstrated that even there he could strike out into new paths away from the beaten track and make the law a progressive instrument for the administration of justice.

A driver of an automobile was charged with homicide.[22] He had approached a street-crossing at a much-used public service transfer station at a speed of about twelve miles an hour, without having his machine under instantaneous control. Suddenly finding a woman in front of him, he promptly swerved the car so as to pass behind her; but the woman, having seen the car, stepped back to avoid it, thus stepping into the path of the car, and her death resulted.

Counsel for the defendant contended that, under these circumstances, the decedent's death was an unavoidable accident. Judge Sulzberger said of this contention:

> "The term 'unavoidable accident' has been of late much abused. It seems often to be applied to the result of the collision rather than to its cause. This error has been favored by the powerful body of opinion which receives with horror the notion that a class of persons, many of them well endowed with worldly goods and bearing a good reputation for honesty and good citizenship, may be guilty of criminal conduct."

The Judge then dwelt upon the subject of criminality in general, declaring that its essence is the earnest pursuit of one's desires without regard to the effect upon others, that "it is selfishness carried too far." Applying this abstract definition of criminality to the facts before him, he expressed the opinion that the

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[21] *Cf.* STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND (2d ed., 1890) 55.

[22] Comm. v. Hoskins, 23 Pa. D. R. 528 (1914).

automobile has been an incentive to the exercise of culpable selfishness, saying:

> "A large number of persons have suddenly felt the sense of superiority, which power beyond the common stimulates in man. Their attention becomes concentrated on the demonstration of this superiority. On the one hand, they look with envy upon others who wield similar powers with greater effect, and crave to outdo them. On the other hand, they cultivate a feeling of superiority, not unmixed with contempt, for those who merely walk. Such feeling inevitably leads to more or less disregard of the rights of pedestrians. The chauffeur and his master tend to view the foot-passenger at a crossing as an interloper who interferes with their legitimate progress. They are prone to consider that when he gets hurt, he has brought the evil on himself and that their part in the affair was unavoidable."

The following are some of the high lights of the opinion:

> "The streets are the property of the people. . . . Automobiles are virtually locomotives on city streets. . . . Railroad locomotives, however, run on rails constituting a well-defined track. Their danger can be fairly well guarded against. . . . In a short time automobiles will have practically displaced horses for ordinary traffic. It is necessary to meet these new conditions. We cannot do so by viewing the automobile as if it were a carriage drawn by horses. The cases defining the relation of foot-passengers to the latter are essentially different from those which subsist between foot-passengers and automobile drivers. We must guard against the error of relying on precedents which have no proper application. . . . The main fact in this new condition with which we are confronted is that locomotive engines, capable of attaining high speed, are traveling up and down our streets, along any lines the drivers may select; that they not only run both ways in several lines, but that they turn corners from cross-streets, and thus heighten the intricacy of the problem and the danger of the pedestrian. . . . The substitution of mechanical traction for animal traction is one of the greatest of modern improvements, being worthy to be compared in importance with the introduction of railroad and steamship. It is absolutely necessary to adjust ourselves to this new phase of modern life."

He laid down the rule that between crossings motor vehicles have the right of way, but that at crossings all drivers of automobiles must be highly vigilant and maintain such control that, on the shortest possible notice, they can stop their cars so as to prevent danger to pedestrians.

He concluded his opinion by pointing out that the verdict of involuntary manslaughter in the case before him was justified by the evidence, and that in some cases of death by automobile even murder might be the proper verdict: "The malicious projection of a death-dealing machine, whether it be a bomb or an automobile, into a crowd of people would doubtless be murder."

In this case the decision was reached, not by the application of precedents, but solely by the consideration of human experience.[23] In view of the practical necessities of a changing world, he warned against the application of prior decisions dealing with horse-drawn vehicles. He realized that the automobile had given rise to a new condition, and that its use by the individual had to be controlled for the sake of society.[24]

In another case, in which principles of the criminal law were involved, Judge Sulzberger clearly indicated that he believed the individual must set aside his personal views and must recognize sound public opinion.[25] A druggist was charged with having violated an old act of the legislature of Pennsylvania,[26] which provided that poisons should not be sold except upon prescription of a physician or else "on the personal application of some *respectable* inhabitant of full age," and in the latter case provision was made that the vendor must make certain inquiries and investigations to satisfy himself that no criminal use would be made of the poison sold. The defendant's counsel argued that the pro-

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[23] *Cf.* Mr. Justice Holmes: "The life of the law has not been logic; it has been experience." THE COMMON LAW 1.

[24] Although this case was reversed, for technical reasons, by the Superior Court, 60 Pa. Super. 230 (1915), the rule laid down by Judge Sulzberger as to the rights of pedestrians at crossings has been adopted by the Supreme Court of Pennsylvania. See Virgilio v. Walker, 254 Pa. 241, 98 Atl. 815 (1916); Twinn v. Noble, 270 Pa. 500, 113 Atl. 686 (1921); Rosenthal v. Phila. Phonograph Co., 274 Pa. 236, 117 Atl. 790 (1922).

[25] Comm. v. Yealy, 21 Pa. D. R. 543 (1912).

[26] Act of 1860, P. L. 382, § 70, Pa. Stat. (1920) § 8006.

visions of the act were vague and indefinite and that the vendor should not be compelled to know, at his peril, whether a buyer is or is not a "respectable inhabitant."

As to this contention the Judge said:

> "Men are frequently called upon in the various affairs of life to determine this very question, and they do it almost automatically and subconsciously. It is true that in this case their judgment is subject to revision by a jury, but that is an inevitable incident of all human affairs in a government like ours. The result carries no hardship. It merely compels a man to learn that he owes to the public and to the law the duty of recognizing well-ordered and sane public opinion, instead of setting up his individual notions as the final standard of right."

Here again he relied upon human experience, rather than upon legal precedent. Actuated by his regard for social welfare, he would not permit ingenuity of construction to invalidate a statute designed to safeguard the public health.[27]

From the few cases thus far cited, Judge Sulzberger's social viewpoint may be summarized in the thought that the will of the individual must be deemed secondary to the welfare of the community.

(*b*) *The Family and the State*

The law has studiously aimed to preserve the integrity of the family, the group from which the modern state has evolved and on whose continued vitality the whole structure of society depends. In recent years there has been a tendency to permit the state to interfere with the autonomy of the family, particularly where the interests of minor children are involved. Thus, the courts have punished parents for cruelty to their own children, and organizations such as the Society for the Protection of Children from Cruelty have been recognized as quasi-public agencies and

[27] So also Comm. v. Darlington, 9 Pa. D. R. 700 (1900), in which the Act of 1895, P. L. 317, making the adulteration of milk a misdemeanor, was upheld as valid and made applicable to the case of a milk dealer who sold milk to which water had been added, although the milk was sold by the defendant as "condemned" milk.

have frequently been appointed the legal guardians of children, despite the protest of their natural guardians, their parents. The line where the father's rights over his child end, and the state's control begins, is not clearly defined. Some judges, inclined to be paternalistic, are unduly solicitous for what they believe to be the best interests of the child. Others, individualistic in their outlook, are reluctant to interfere with the parents' custody and control of their offspring.

Judge Sulzberger did not believe that it is the duty of the government to be paternal toward its citizens. Like Macaulay, he could not conceive of a government loving its subjects as a father loves his child.[28]

In 1912, the Society for the Protection of Children from Cruelty filed a petition [29] in which it was averred that a child about seven years old named Tony Tuttendario, living with his parents, was suffering from a deformity known as rickets which could be cured by an operation; that without an operation the boy would probably be a cripple all his life and unable to provide for himself; and that his parents refused to permit the operation, which would be performed without any expense to them.

Medical and surgical experts testified that the disease was curable by operation upon the bones and that the operation had been very extensively performed; that it could be cured in no other way; that if it was not cured, a man could not get along in life; that the deformity tends to increase; that it interfered with a person making a livelihood in anything that required standing or walking, but that any occupation that he could attend to sitting down would not be interfered with.

The mother of the boy testified that she had three living children, seven having died; that Tony had been afflicted with rickets for six years; that at the time of the trial he was seven and one-half years old; and that she would never permit an operation to be performed upon her son.

The Society for the Protection of Children from Cruelty asked that the boy be committed to them for the purpose of hav-

[28] MACAULAY, GLADSTONE ON CHURCH AND STATE.

[29] *In re* Tony Tuttendario, 21 Pa. D. R. 561 (1912).

ing the operation performed. The Society claimed that the parents were cruel in refusing to give their child a better opportunity in his future life than he could have if the disease were not cured, and that the fact that the parents' refusal to give their consent to the operation was due to fear on their part that the operation might prove fatal was unworthy of consideration in view of expert testimony that the operation was not at all dangerous.

Judge Sulzberger, in his opinion, first reviewed the legislation of the State of Pennsylvania during a half century, showing the anxious care with which the legislature has, from time to time, considered the subject of cruelty to children, and demonstrated that the natural right of parents to the care and custody of their children has been abridged only in cases where they have been guilty of inflicting physical or moral injury upon their offspring with malicious intent. Pointing out that it is this malicious intent which stamps the offense as cruelty in the law, he said:

> "The parents here are charged with allowing their unreasonable apprehension of injury to their child to outweigh the reasonable judgment of professional experts that the danger, whatever it is, should be incurred. There is here no question of legal cruelty or malice. On the contrary, it is averred that the unreasonable kindness of the parents will produce results quite as harmful as if their motives were malicious.
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> "We are, therefore, asked to supersede the child's natural guardians on the sole ground that their judgment is impaired by natural love and affection, and that we should substitute for them a humane society whose judgment is untainted by such emotions.
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> "We see no warrant in the statutes for granting this request. We have not yet adopted as a public policy the Spartan rule that children belong, not to their parents, but to the state. As the law stands, the parents forfeit their natural right of guardianship only in cases where they have shown their unfitness by reason of moral depravity."

The Judge was not content with this pronouncement that cruelty cannot exist in the absence of actual malice. He declared further that even if the law had advanced so far as to consider defective judgment of parents in a critical case a good reason for

depriving them of their guardianship, he would not be prepared to say that the parents in the case before him had used bad judgment. With his characteristic clarity, and with a trace of irony, he said:

> "The science of medicine and surgery, notwithstanding its enormous advances, has not yet been able to insure an absolutely correct diagnosis in all cases, and still less an absolutely correct prognosis. There is always a residuum of the unknown, and it is this unknown residuum which scientists, by a necessary law for the development of science, disregard, but which parents in their natural love for their children, regard with apprehension and terror. Cases are not unknown in which patients, apparently in defiance of logical reasoning, die within a few days after having been successfully operated on. Scientifically considered, such catastrophies merely establish the high average of successful operations and demonstrate the average safety of the patients who undergo them. The law of average, however, is of no benefit to the exceptional individual who succumbs. For him there is no longer a percentage of chances. His loss is total."

It is questionable whether at the present time our juvenile courts would concur in the view expressed in this opinion. The judgment of scientific experts has been repeatedly relied upon despite the vague fears and premonitions of affectionate parents. The primary consideration now is the interest of the child, his happiness, his health, his general welfare.

Although the basis for Judge Sulzberger's conclusion is a profound appreciation of the human factors involved in the case, it is not altogether impossible that in dismissing the petition of the Society, he was subconsciously influenced by the spirit of the ancient Jewish law, which regarded the father as supreme over his children.[30] Be that as it may, there can be little doubt that he had nothing in common with the doctrinaire theorists who believe in the paternalism of the state, and who are bent upon interfering with the normal life of the family.

[30] The father's power of life and death among the ancient Hebrews is shown in Genesis, XXII; Judges, XI; Leviticus, XVIII, 21, and XX, 2-5; II Kings, XXIII, 10; Jeremiah, XXXII, 35.

(*c*) *The Status of Woman*

In a case that arose in 1915,[31] Judge Sulzberger discussed the change in modern times in the industrial and social status of woman. A Mrs. Herb had been a member for ten years in a labor union and beneficial society. She died, leaving her husband surviving her. The rule of the society provided that death benefits were payable to the decedent's "widow" or, failing such widow, to the decedent's minor children.

The husband brought suit against the Union, claiming that the word "widow" in the enumeration of beneficiaries, meant not only the surviving wife of a male member of the organization, but also the surviving husband of a female member. The defendants on the other hand, contended that the word "widow" meant just what it said and no more; that the main intent of the society's rule was to give help to people who actually need it, those who are dependent upon the decedent for assistance, of which the decedent's death deprives them.

Judge Sulzberger said:

> "As to the question of literal meaning, there is, of course, no doubt. A man is not a widow. The untold ages during which the men have wielded predominance in human affairs have had their effect on language. It cannot be gainsaid that the use of masculine words in a large sense, so as to include females, is general throughout the world. The idea behind it is that women's duties are confined to the household, and that if a few individuals of them stray into larger affairs, they may be well content to be included in masculine terminology without claiming recognition as a distinct class. Circumstances have, however, changed. Female workers, outside of households, are now numbered by millions. The defendants' organization doubtless includes many of them. Yet in the voluminous document known as their "constitution" there is no expression or hint that any woman could have any part in their association. The member is always masculine. . . .
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> "It is obvious that the defendants adhered with sturdy

[31] Herb v. Cigar Makers' International Union of America, 24 Pa. D. R. 930 (1915).

> conservatism to phraseology that had been coined in ages when women were in a position different from their present state. Though they meant a woman, they spoke of her as 'he' and 'him,' and thereby showed that, in using the masculine form, they meant to include both genders. Under such circumstances, it is neither unfair nor illogical to conclude that the word 'widow' may be intended by them to include 'widower.' "

A nominalist, a literalist, would have decided that the "widow" means a woman and not a man, and would have cited Webster as his authority. Judge Sulzberger, the realist, the student of things as they are, looked behind the words to the facts, and decided that the word "widow" may have a far wider meaning in the law than in the dictionary.

(*d*) *The Alien*

Himself a foreign-born American citizen,[32] it is interesting to find how Judge Sulzberger reacted in a case involving the status of an alien who had declared his intention to become an American citizen.[33] In this case there is also an exposition of the attitude of Judge Sulzberger toward woman in modern society, for the case has to do with the rights of a woman citizen who weds an alien residing in this country.

Prior to the adoption of prohibition, the county judges had jurisdiction over liquor licenses. A woman applied to the court for a renewal of a wholesale liquor license, and a remonstrance was filed on the ground that the applicant was a foreigner, not an American citizen. It appears that the petitioner, a native-born citizen, had married a son of Italy, who resided in Philadelphia and who had declared his intention to become an American citizen. It was contended that the marriage of the applicant to the Italian had deprived her of her American citizenship, by reason

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[32] Born at Heidelsheim, Baden, June 22, 1843, and migrated to Philadelphia with his parents in 1848.

[33] Ciliberti's Application, 20 Pa. D. R. 489 (1911), in which the Act of March 2, 1907, 34 Stat. 1228, U. S. Comp. Stat. (1918) § 3960, entitled "An Act in reference to the expatriation of citizens and their protection abroad," was interpreted.

of the provisions of an act of Congress, which, among other things, declared that an American woman who married a foreigner should take the nationality of her husband and should not be entitled to American protection abroad.

Judge Sulzberger declared that even if the act of Congress must be construed in accordance with the view of the remonstrant, namely, that a woman expatriates herself by mere marriage to a foreigner, the applicant in this case had married a man whose status was different from that of a foreigner. He decided that a person who has declared his intention to apply for citizenship, accompanied by residence for three years within the United States, belongs to "a distinctive class, midway between citizenship and alienage," and that the wife of a declarant remains a citizen of the United States.

The Judge then pointed out that the intention of the act of Congress was not to expatriate a woman by reason of her marriage with an alien unless she actually removed from this country and acquired a foreign domicile. The purpose of the act, he said, was to avoid causes of friction with other states by reason of their conduct toward American citizens or persons claiming the protection of American citizenship while within the borders of foreign states. He held that persons who reside in the United States and have no intention to depart from the country are not within the purview of the statute. He gave a statesmanlike, rather than a legal, argument in support of his position, saying:

> "Nowhere in the act do we discern any intent to declare that citizens of the United States, residing here without any intention of abandoning their domicile, may remain here and throw off their citizenship. The consequences of accepting such a doctrine would be momentous and far-reaching. In times of stress, when the government needs financial aid and the military service of its citizens, the power of theoretical expatriation by actual citizens, resident here, might prove a danger to the republic. When we keep in mind that the leading thought of the Act of 1907 is to prevent the United States from being drawn into complication with foreign states by claims of citizenship set up on the strength of colorable naturalization and declarations, we can scarcely impute to Congress the thought that the United States government

> could, in times of war, be met and defeated on its own soil by colorable expatriations."

The construction of the act of Congress as made by Judge Sulzberger has been disapproved by the Supreme Court of the United States, which in a recent case [34] held that a native-born American woman who married a foreigner residing in the United States, and intending to continue to live here, loses her citizenship, regardless of her choice, as the statute contains no express limitation as to the place of residence of the parties as long as the marital relation continues. The Supreme Court said:

> "It would transcend judicial power to insert limitations or conditions upon disputable consideration of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate."

Judge Sulzberger, in holding that a declarant has a different status from a foreigner, was similarly not in accord with the decisions. The authorities uniformly declare that one is either a citizen or an alien, and that the mere declaration of intention to apply for citizenship is nugatory unless followed up by complete naturalization.[35]

To perpetuate the old outworn legal principle that the wife must *nolens volens* adopt the citizenship of her husband, was abhorrent to Judge Sulzberger. There can be no doubt that he did "transcend judicial power" by inserting into the statute a limitation which was not intended by Congress, but which he regarded as necessary, and that he also created a fanciful distinction between the foreigner and the declarant. All this was done for the purpose of preventing the literal interpretation of an act of Congress, conceived in the spirit of an age long past when the wife was the chattel of her spouse, from depriving a modern woman in business of a valuable property right.

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[34] Mackenzie v. Hare, 239 U. S. 299 (1915).

[35] The only exception is the provision that the widow and minor children of one who has declared his intention to become a citizen, but who dies before he is actually naturalized, may become citizens wihout declaring their intention. *In re* Schmidt, 161 Fed. 231 (S. D. N. Y., 1908); *In re* Robertson, 179 Fed. 131 (M. D. Pa., 1910).

(*e*) *The Negro*

The population of America is composed of numerous ethnic, religious and racial groups, and the American judge has occasionally to decide cases where the members of a particular group seek relief from a threatened or an actual invasion of their rights. The so-called "Negro problem" is dealt with not only in works on sociology, but also in our courts of law. In the decision of such controversies, the judge discloses his tolerance or prejudice, his cosmopolitanism or provincialism.

In 1906, a play called "The Clansman" was to be produced at the Walnut Street Theatre in Philadelphia. A number of negro citizens complained to the Mayor that the probable result of the play, which was anti-negro in its attitude, would be to arouse racial antagonism which might terminate in riot and bloodshed. The Mayor prohibited the play from being produced. The owners and managers of the theatre petitioned the court for an injunction to restrain the Mayor from interfering with the production of the play.[36]

After a thorough discussion of the right of the Mayor to censor dramatic performances, the Judge concluded:

> "From all the evidence, we are satisfied that the play is a malicious libel upon a class of citizens, and in effect advocates their enslavement or destruction, in spite of constitions and laws and common humanity.
>
> "While the good sense of the community may in general be relied on to appraise such fustian at its real value, and while we might have been skeptical as to the power of such a piece of work to produce a permanent impression, yet these circumstances do not give the author of a libel the right to invoke the aid of chancery to procure its publication."

In this connection there should be noted a charge made extemporaneously by Judge Sulzberger to a jury in a suit for damages instituted by a negro against the owner of a fashionable restaurant and hotel for refusing to serve him because of his

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[36] Theatre Company v. Weaver, 15 Pa. D. R. 794 (1906).

color. This charge is regarded by the Chief Justice of Pennsylvania as a classic and is quoted in full in his "Trial by Jury." [37]

(f) *The Criminal*

Judge Sulzberger did not indulge in mawkish sentimentality over the persistent and habitual criminal. He, nevertheless, kept in mind that the object of society in punishing the offender was not mere vengeance,[38] and that the primary purpose of the police is to prevent the commission of crime. He had no patience with police methods which ignored the constitutional rights of criminals and he abhorred the schemes and wiles resorted to by officers of the peace in order to entice criminals by pretending to be partners in their crimes.

In a case [39] decided in 1912, he severely disapproved of the action of the police in making a raid, without a warrant, upon the defendant's house and arresting persons found there, charged with playing games of chance, and at a later hour on the same day making another raid and arresting certain persons quietly sitting there, some of whom were alleged to have been well-known thieves. An indictment was found against the defendant on the charge of keeping a "disorderly house," the police hoping that by searching the place they might obtain clues to certain reported thefts. In the course of his opinion, the Judge said:

> "If a person once indicted could, at the election of the police, be arrested over and over again without warrant and without committing felony, misdemeanor or breach of the peace, on no better ground than that the first indictment had given him a bad name, there would be created a class

[37] Woodrow v. Duffy, 42 Pa. C. C. 641 (1914).

[38] See Comm. v. Darlington, *supra*, note 27, where the Judge said: "The object of a fine besides marking the condemnation by the law of an act, is that it shall reach the offender, and remind him that he must not do such things again; and more important still, that it shall deter the rest of the community."

[39] Comm. v. Satinsky, 21 Pa. D. R. 329 (1912). See Comm. v. Bickings, 12 Pa. D. R. 206 (1903) for a similar judicial utterance, the Court saying: "The liability of men to fall into crime by consulting their interests and passions is unfortunately great, without the stimulus of encouragement. No state, therefore, can safely adopt a policy by which crime is to be artificially propagated." So also Bauer's Application, 24 Pa. D. R. 1068 (1915), where the judge refused to renew a private detective license for one who had been instrumental in obtaining evidence in a divorce proceeding against a woman, by luring her into a compromising situation.

of citizens to whom the ordinary right of personal liberty would be denied. Their freedom would be at the will or whim of the police authorities. . . .

"Where, as in this case, the commonwealth is utterly without right, we will not be too curious to uphold mere technical details. In the interest of the citizen's freedom, we will consider that we have allowed a writ of habeas corpus, have heard the evidence and have determined that he is entitled to a discharge. . . ."

A careful study of the foregoing cases involving social problems, problems that are debatable and allow of honest differences of opinion, will disclose that Judge Sulzberger did not solely or even principally depend upon prior decisions of other judges. He utilized the knowledge which he had of men, their thoughts, their emotions and their passions, rather than the book-knowledge which a digest of cases or an encyclopædia of law might provide. He was sometimes wrong in his reading of law; he was almost invariably right in his reading of human nature.

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(*To be Concluded*)